

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

1	UNITED STATES OF AMERICA,) Case No.
2) 4:15-CR-6049-EFS-2, 4, 10,
3	Plaintiff,) 16, 18, 19, 20, 21, 23
4)
5	v.) May 29, 2018
6)
7	JESE DAVID CARILLO) Richland, Washington
8	CASILLAS (2), ALEXIS JOEL)
9	GARCIA PALOMINO (4), BRITTNEY) Pretrial Conference/Motion
10	LEE ZARAGOZA (10), EDGAR OMAR) Hearing
11	HERRERA FARIAS (16), ALFREDO)
12	MAGANA GARIBAY (18), JUAN BRAVO)
13	ZAMBRANO (19), MARCIAL BRAVO) Pages 1 to 75
14	ZAMBRANO (20), MIGUEL REYES)
15	GARCIA (21), JOSE ADRIAN)
16	MENDOZA (23),)
17)
18	Defendants.)

BEFORE THE HONORABLE EDWARD F. SHEA
SENIOR UNITED STATES DISTRICT COURT JUDGE

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1 (May 29, 2018; 9:18 a.m.)

2 THE COURTROOM DEPUTY: All rise.

3 (Call to Order of the Court.)

4 THE COURT: Good morning to you all. Please be seated.

09:18:34 5 THE COURTROOM DEPUTY: Matter before the Court is United
6 States of America v. Jese David Carillo Casillas, et al., Cause
7 No. 4:15-CR-6049-EFS, Defendant Nos. 2, 4, 10, 16, 18, 19, 21,
8 and 23. And the attorneys for Defendant No. 20, Marcial Bravo
9 Zambrano, are also present, but the defendant is not present.

09:19:04 10 Counsel, please state your presence for the record.
11 We'll start with the Government first, and then we'll move to
12 the top row in the box and then over to counsel at counsel
13 table.

14 MS. VAN MARTER: Good morning, Your Honor. Stephanie
09:19:14 15 Van Marter and Caitlin Baunsgard, along with case agent Joe
16 Brazeau, present for the United States.

17 THE COURT: Thank you.

18 MR. SCHWEDA: Your Honor, Pete Schweda with Mr. Herrera
19 Farias.

09:19:25 20 MR. NIESEN: Good morning, Your Honor. Jeffrey Niesen
21 with Mr. Palomino.

22 MR. VIETH: Good morning, Judge. Nick Vieth for
23 Mr. Casillas.

24 MR. MARCHI: Good morning, Your Honor. Nicholas Marchi
09:19:36 25 on behalf of Mr. Garibay.

1 MR. THERRIEN: Good morning, Your Honor. Ken Therrien
2 for Miguel Reyes Garcia.

3 MR. SMITH: Rick Smith on behalf of Juan Zambrano, Your
4 Honor.

09:19:45 5 MR. JOHNSON: Scott Johnson on behalf of Jose Mendoza.

6 MR. LARA: Victor Lara for Brittany Zaragoza.

7 MR. ZACHARY AYERS: Zachary Ayers and Walter Ayers on
8 behalf of Mr. Zambrano.

9 THE COURT: Mr. Zambrano was arraigned sometime on
09:20:00 10 Friday --

11 MR. ZACHARY AYERS: Correct.

12 THE COURT: -- and an order to that effect was entered
13 at about 4:45 on Friday, and as a result of that entry at that
14 time, on this weekend there was a lack of communication about
09:20:12 15 providing transportation for him to be here today.

16 MR. ZACHARY AYERS: I believe so.

17 THE COURT: And as a result, he's not here in court.
18 But I invite you to make any motions or request any hearings you
19 want on anything that goes on, including your case.

09:20:27 20 Okay?

21 MR. ZACHARY AYERS: Understood, Your Honor.

22 THE COURT: We can bring him back -- so nothing that
23 occurs today will prejudice him. We will take up the issue
24 right now of trial dates in your client's case and in the case
09:20:40 25 that we heard this morning, Mr. Palomino.

1 Okay. Have a seat. Thanks.

2 MR. ZACHARY AYERS: Thank you, Your Honor.

3 THE COURT: Ms. Van Marter, let's talk about that right
4 at the outset.

09:20:53 5 And consistent with that, one of the attorneys is
6 telling me there's rolling discovery, a pejorative term in my
7 court, especially when the indictment is December 16th of 2015,
8 with a second superseding indictment 12-6 of '16.

9 Please tell me that that's not so; that that is
09:21:16 10 inaccurate; that there is no rolling discovery.

11 MS. VAN MARTER: There is no rolling discovery, Your
12 Honor. What was last disclosed to counsel of -- new counsel of
13 record is the majority of the discovery. That's the most recent
14 disclosure. So that's for the Ayerses -- obviously they didn't
09:21:30 15 have it previously -- as well as Mr. Niesen on behalf of
16 Mr. Palomino.

17 THE COURT: So that's discovery already provided --

18 MS. VAN MARTER: Yes.

19 THE COURT: -- to all the other counsel?

09:21:40 20 MS. VAN MARTER: Correct.

21 THE COURT: So it should be in their files.

22 MS. VAN MARTER: Correct.

23 THE COURT: Did anybody call you and tell you that there
24 was new discovery?

09:21:46 25 MS. VAN MARTER: No.

1 THE COURT: Okay.

2 MS. VAN MARTER: Nobody contacted the United States to
3 that effect at all.

4 THE COURT: Okay.

09:21:51 5 MS. VAN MARTER: As to new counsel, we've had
6 conversations about the discovery that they've received. I've
7 only had one conversation with Mr. Vieth about any questions
8 that he may have or any additional information that he may like,
9 and I believe we've worked that through.

09:22:06 10 The only other discovery that was produced was pursuant
11 to the hearing that this Court was already -- we already
12 presided over; that had to do with Mr. Schweda's requests, and
13 we already went over that issue. And the only outstanding thing
14 is the CI disclosures that I have a court date -- or a date set
09:22:26 15 by this Court in August for those disclosures, which we've
16 already discussed in front of this Court a number of times.

17 THE COURT: Okay. Well, Mr. Niesen, I don't know
18 what -- Mr. -- the Ayerses, what is your position on going to
19 trial in October, given your client's charges? What charge is
09:22:40 20 your client charged with? You can speak from there.

21 MR. ZACHARY AYERS: Your Honor, he is charged with a
22 conspiracy in Count 1.

23 THE COURT: So Count 1.

24 MR. ZACHARY AYERS: We would agree to the continuance
09:22:51 25 that the other counsel is moving for as well today.

1 THE COURT: This is not a continuance.

2 MR. ZACHARY AYERS: Or I mean --

3 THE COURT: This is a separate trial date. Nobody is
4 getting a continuance at this point.

09:23:00 5 MR. ZACHARY AYERS: Okay.

6 THE COURT: You can have a -- because the amended case
7 management order in Palomino set his trial for October. There's
8 been no amended case management order dealing with your client.
9 So as I put in a footnote, flagging it to the people who
10 received all of that, all of the counsel, anybody arrested
11 recently is going to trial in March of 2019.

12 MR. ZACHARY AYERS: Understood, Your Honor.

13 THE COURT: Okay.

14 MR. ZACHARY AYERS: That was the date we were
09:23:25 15 anticipating.

16 THE COURT: Thank you.

17 MR. ZACHARY AYERS: Thank you.

18 THE COURT: But if something arises -- let me know if
19 your client has different views.

09:23:32 20 Have you been able to talk with your client yet?

21 MR. ZACHARY AYERS: Only since last Friday, Your Honor.
22 We hadn't had a chance to talk with him about the dates yet.

23 THE COURT: Okay. Well, then if that develops, set a
24 hearing, and we'll deal with the issues --

09:23:43 25 MR. ZACHARY AYERS: Okay.

1 THE COURT: -- at your convenience.

2 Okay. So that takes care of those two individuals.

3 They'll go to trial in March of next year, which gives them more
4 than adequate -- gives them adequate time to prepare, given the
09:23:57 5 amount of time every other attorney has had.

6 Mr. Vieth, you suggested that there was a need for more
7 Behind the Gavel analysis, and I'm perplexed because I don't get
8 why that is so.

9 MR. VIETH: Your Honor, do you want me to go to --

09:24:14 10 THE COURT: No, you're fine.

11 MR. VIETH: All right. In speaking with Behind the
12 Gavel -- and I did put a call in, I believe it was on Thursday
13 or Friday, my office, to Behind the Gavel to have them available
14 by phone if the Court has any questions. But the need, as I
09:24:34 15 understand it, was to continue to give counsel, not only myself
16 but everybody else, because I am now the lead attorney on
17 getting all of their budgets in order, making sure that they
18 have the proper funds, to give not only my office the ability to
19 call them, pinpoint potential discovery that is valuable to
09:24:59 20 me --

21 THE COURT: Sorry, Counsel. You're going to have to
22 repeat that again. Why is there additional work needed from
23 Behind the Gavel? I think I approved something over \$40,000 for
24 that.

09:25:09 25 MR. VIETH: I believe so, Judge.

1 THE COURTROOM DEPUTY: I'm sorry, Judge. The
2 interpreter needs the microphone -- can you speak into the
3 microphone, please, so she can pick it up in the headset?

4 THE COURT: Okay.

09:25:20 5 MR. VIETH: Oh. Sorry about that.

6 Do I need to start over, Ms. Interpreter?

7 Okay. And so, Your Honor, as I understand it and the
8 request from Behind the Gavel was to continue to provide the
9 same expertise that they have provided, to other counsel,
09:25:38 10 previous counsel to the more recent appointed counsels.

11 THE COURT: Define most -- "more recent appointed
12 counsel."

13 MR. VIETH: Well, Mr. Ayers, I believe, was just
14 appointed. I believe there was one or two --

09:25:51 15 THE COURT: Mr. Niesen.

16 MR. VIETH: Mr. Jeff Niesen as well.

17 Sorry, Jeff.

18 And so it's my understanding that it's their request
19 that they be able to provide the same assistance that they have
09:26:03 20 given my office and other offices in the past with their same
21 expertise in pinpointing certain discovery and helping those
22 members of the defense with the same opportunities that we've
23 received.

24 THE COURT: Well, why would that motion come through you
09:26:23 25 rather than through Mr. Niesen or Mr. Ayers?

1 MR. VIETH: It's my understanding, Your Honor, that when
2 I received the case, that the lead counsel that ended up having
3 to withdraw and I took over, I was the point for the Ninth
4 Circuit budgeting coordinator Blair Pearlman, and then it was my
09:26:46 5 responsibility to put together the budget for Behind the Gavel.

6 THE COURT: Okay. That makes more sense to me. Thanks
7 for that clarification.

8 MR. VIETH: Thank you, Judge.

9 THE COURT: Okay. All right. Let's talk about what
09:27:00 10 motions we have.

11 What are we doing today?

12 For the record, the same rulings I've made in the past
13 regarding shackling remain in place, given the number of
14 defendants, the stakes, and the public interest in safety for
09:27:27 15 the defendants, counsel, and the courtroom staff; six in custody
16 defendants will be permitted to be shackled by the United States
17 for this hearing.

18 Okay. What's next?

19 MS. VAN MARTER: Are you asking me? I'm sorry, Your
09:27:44 20 Honor. I'm aware of only one pending motion thus far before the
21 Court, and that is on behalf of Mr. Herrera Farias in regard to
22 his motion in limine to exclude reference to his prior 2012 drug
23 conviction that was --

24 THE COURT: Okay. Let's argue that. Stay at the
09:28:02 25 podium.

1 Mr. Schweda.

2 MR. SCHWEDA: I have another motion that's pending as
3 well, Your Honor.

09:28:27

4 THE COURT: Why don't you tell us which ECF it is so
5 that we can --

6 MR. SCHWEDA: Sure.

09:28:38

7 THE COURT: -- work with you to make sure that we cover
8 each and every motion that you filed and each and every motion
9 that any defense lawyer has filed so that progress is made
10 during today's hearing.

11 MR. SCHWEDA: It deals with the -- ECF 617, which deals
12 with the --

13 THE COURT: ECF 617?

14 MR. SCHWEDA: Correct.

09:28:59

15 THE COURT: Motions in limine?

16 MR. SCHWEDA: Yes.

17 THE COURT: Okay. And then --

18 MR. SCHWEDA: And then --

19 THE COURT: What's -- 617. So what else?

09:29:11

20 MR. SCHWEDA: And then I have, I believe it's ECF 757,
21 which is the 609, 403 motion.

22 THE COURT: Okay. What's next?

23 MR. SCHWEDA: Those are the only pending motions I have.
24 I believe that Mr. Therrien -- is it -- I believe he had some
25 motions. Somebody had some other motions in limine that are

09:29:37

1 pending as well, Your Honor.

2 THE COURT: Let's start with yours.

3 MR. SCHWEDA: Okay. Which one would you like?

4 THE COURT: So let's start with 617.

09:29:49 5 MR. SCHWEDA: Your Honor, we're moving the Court to
6 limit the Government's use of modus operandi witnesses. The
7 Government has disclosed that they're going to be calling a
8 number of co-conspirators as fact witnesses, and based on that,
9 it would be unfair to allow the Government to present modus
09:30:21 10 operandi expert witnesses, which would dovetail with the facts
11 that were testified to, if they are testified to, by cooperating
12 co-conspirators.

13 It also would be based on --

14 THE COURT: When you say they're going to --
09:30:39 15 co-conspirators are going to testify --

16 MR. SCHWEDA: Pardon?

17 THE COURT: -- to what effect or to what point?

18 MR. SCHWEDA: Well, Your Honor, that's hard for us to
19 tell at this time for the simple fact that the discovery is
09:30:52 20 highly redacted. We have not -- we have not learned of the true
21 identities of cooperating witnesses. We can guess at some of
22 them because of the fact that they're not present in court -- in
23 court today, but as to what they would say, we haven't, in many
24 instances, received the discovery of what those people will say.
09:31:20 25 There's some bits and pieces, I believe, but it's not

1 comprehensive by any means.

2 The -- by allowing the Government to present their agent
3 M and O witnesses -- or MO witnesses, it would allow the
4 Government to impermissibly have witnesses testify as to the
09:31:49 5 ultimate facts, because they would basically be validating what
6 the cooperating co-conspirators had said.

7 THE COURT: Well, that said, that must be a fairly
8 common complaint, and I'm sure there must be Ninth Circuit
9 precedent that I should be reading.

09:32:08 10 What are the cases that support your position?

11 MR. SCHWEDA: Well, I think the --

12 THE COURT: I just want a specific reference to a
13 specific case.

14 MR. SCHWEDA: There's no -- well, I can't give you a --
09:32:19 15 there's no bright-line rule, Your Honor. The Court --

16 THE COURT: Well, let's take -- let's take a
17 hypothetical. Suppose there are co-conspirators that are going
18 to testify about the money laundering and the movement of drugs.

19 Are there cases in the Ninth Circuit that talk about the
09:32:37 20 co-conspirators' testimony eliminating the need for a modus
21 operandi expert?

22 MR. SCHWEDA: I -- well, they direct -- they direct the
23 Court's attention to Rule 403 and determining --

24 THE COURT: So you're telling me there is no case,
09:32:53 25 because you haven't cited one. But if there is, I want to look

1 at it.

2 MR. SCHWEDA: Well, yes, I have, Your Honor. I've cited
3 it in the materials I've presented to the Court, so --

4 THE COURT: Okay. Then let's look at those. Let's get
5 those up, and I'll take a look at them with you.

6 And that's 617. Okay?

7 MR. SCHWEDA: Correct, Your Honor.

8 THE COURT: Okay. We're talking about 617; is that
9 correct?

10 MR. SCHWEDA: Correct, Your Honor.

11 THE COURT: Okay. So in 617, you cite several of the
12 rules. You cite *Daubert*; *Kumho Tire*; and then you say for 702,
13 *United States v. Hankey*, which sets out a number of
14 considerations. You recite *Daubert*, and I'm on Page 6, and I
15 don't see any citation to any case that says that if
16 co-conspirators testify about the facts, that the modus operandi
17 expert is therefore unnecessary and should not be allowed to
18 testify. That's a very specific question, Mr. Schweda.

19 MR. SCHWEDA: Okay.

20 THE COURT: When I looked at 617, I didn't see any case
21 that said that.

22 Now, maybe I've overlooked something and I just whipped
23 through it.

24 But is there a page I should look at that shows me that
25 case?

1 MR. SCHWEDA: Well, Your Honor, I didn't come prepared
2 to cite you cases. I prepared argument on the basis of what I
3 wanted -- I didn't want to repeat what was in my briefing. So I
4 think in the motion on 757, I probably do a better job of
5 directing the Court's attention to --

09:34:41

6 THE COURT: Well, correct me if I'm wrong, but 757 is a
7 609.

8 MR. SCHWEDA: Correct, but it deals with the same -- it
9 deals with the same issue. The issue under 609 and 403 are the
10 same. They are whether the probative value outweighs the
11 prejudicial effect on --

09:34:59

12 THE COURT: Okay. So you're relying on general
13 principles of 403.

14 MR. SCHWEDA: Correct, Your Honor. And --

09:35:12

15 THE COURT: Okay.

16 MR. SCHWEDA: -- just the whole analysis of what --
17 whether unfair probative value outweighs the prejudicial effect.
18 And I think that the -- for example, in the Government's
19 disclosure, which is ECF 474, at Page 5 they identify -- they
20 don't identify, they state that an undercover agent will be
21 testifying as to money laundering, and he's going to be a fact
22 witness because he -- the testimony will show that he contacted
23 one or more co-conspirators about laundering money. He's not
24 identified, but they go on to say that based upon his
25 experience -- they're not calling him as an expert, but they're

09:35:36

09:36:02

1 going to have him give testimony on the significance of his role
2 and testimony as to the meaning and significance of various
3 events in the conspiracy. And it's --

4 THE COURT: Excuse me. You're sliding from one to the
09:36:19 5 other, and I'd rather not do that. So let's confine ourselves
6 to 617.

7 MR. SCHWEDA: I --

8 THE COURT: So in 617, I've read your materials in 617,
9 and I know exactly what they say. So you've said your piece,
09:36:32 10 and I'm going to hear from Ms. Van Marter, and you can reply.

11 Ms. Van Marter?

12 MS. VAN MARTER: Thank you, Your Honor.

13 I think that the concern that the Ninth Circuit has
14 raised recently has to do with the interplay between a fact
09:36:42 15 witness who is also going to be called as a modus operandi
16 witness. That is why in our notice we have separated out the
17 undercover agent who will be providing factual testimony. He
18 can still provide testimony based upon his training and
19 experience and based upon his involvement in the investigation.
09:36:58 20 That is a separate issue than the United States' notice of
21 intent to present modus operandi expert testimony through law
22 enforcement.

23 In our response, and is my experience a lot during these
24 trials, is that many times the co-defendant witness testimony
09:37:13 25 does address a lot of the manners and operations within that

1 drug trafficking organization. That may alleviate the need for
2 the United States to follow that up with additional law
3 enforcement modus operandi expert testimony.

4 However, we have kept the notice because this is a
09:37:31 5 sophisticated organization that has a money laundering aspect to
6 it as well as the transportation of substantial quantities of
7 narcotics. There are certain things that are not necessarily
8 common knowledge to jurors about how those organizations may
9 work. So we have noticed Special Agent Bill Leahy, who is now
09:37:50 10 retired. We also have an RCMP officer who is not a fact witness
11 but exclusively would be offered as a modus operandi witness for
12 the perspective of the Canadian authorities because --

13 THE COURT: On what issue?

14 MS. VAN MARTER: Specifically on the transportation of
09:38:04 15 narcotics up into the Canadian jurisdiction, as well as the --
16 this concept of money drops, this concept of use of individuals
17 up in Canada to drop Canadian currency for the purpose of being
18 laundered into American currency. So having their commentary
19 and expertise as to why that is done in these organizations.

09:38:24 20 Again, it may not be necessary after we get through some
21 of the cooperating witness testimony, but I think it certainly
22 is something that the United States, under case law -- and the
23 Court is correct; there is no case law that defense can point to
24 that excludes such proposed testimony just because we have
09:38:40 25 co-defendants who may also be able to testify about the

1 structure of an organization. It doesn't exclude it. It
2 certainly gives this Court a gatekeeping function as to whether
3 there's a necessity to get into those matters with an additional
4 witness. And I think sometimes that's hard to tell until we get
09:38:56 5 into trial as to what other remaining issues might be open to
6 explain to the jury about how these organizations work.

7 So in an abundance of caution, we have noticed that to
8 the Court, that we do have these potential witnesses if there
9 are gaps in the presentation of that evidence, so that the jury
09:39:10 10 can understand how an operation like this would work, especially
11 if we're talking from Mexico all the way up into Canada and out
12 back East with both the drug flow and the money flow.

13 THE COURT: Well, your position makes sense to me if
14 you, in fact, have one single or two individuals, let's say, who
09:39:28 15 are key players in the conspiracy and have, by virtue of their
16 position, a clear understanding of how it all works; if that
17 were so, so be it.

18 On the other hand, if you have pieces of the puzzle, and
19 someone needs to say, from your perspective, that this is the
09:39:51 20 modus operandi and this is how they work, given all of these
21 pieces, then that makes sense to me as well.

22 So, Mr. Schweda, anything else?

23 MR. SCHWEDA: Yes, Your Honor.

24 I guess, you know, the whole idea of allowing MO experts
09:40:06 25 that are agents is so -- to help the jury understand things

1 that, innocuous events that make them -- that are inculpa --
2 that are really inculpatory events. And that is not what is
3 going to happen here. The fact that --

4 THE COURT: How do you know?

09:40:23 5 MR. SCHWEDA: Well, if they present co-conspirators that
6 say, "This defendant transported drugs over the border. I -- I
7 was there. I gave him the drugs. He came back with the money,"
8 for example, there's no need to have somebody come in and say,
9 based -- "My expert opinion is that this is how they do it." It
09:40:47 10 just basically reinforces the facts. It isn't something that
11 needs to be testified to to -- for the jury to understand that
12 this is evidence -- evidence --

13 THE COURT: I disagree with you. What I know now --
14 and, admittedly, it's far less than all of you know, but what I
09:41:08 15 do know from what I've read is that this was a sophisticated,
16 far-reaching, multi-person operation that involved money
17 laundering and transport of drugs. And it seems to me that
18 under a conspiracy, MO testimony is appropriate, and I'm going
19 to deny your motion.

09:41:28 20 If at trial it turns out that you think it's not
21 necessary by virtue of what's occurred, well, then you could
22 make that motion, and you're free to do so. But right now I'm
23 going to permit the modus operandi because my belief is, given
24 what I know of the case, that it's necessary, and that it's
09:41:46 25 relevant, and that it would be helpful to the jury on matters

1 that they know nothing about, such as money laundering or money
2 drops, especially on an international level. And so I'm going
3 to permit the modus operandi, and you can renew your motion at
4 trial if you think there is a basis to do so.

09:42:06 5 MR. SCHWEDA: May I ask the Court to clarify a couple of
6 things?

7 The first one is if the -- I -- I would ask the Court to
8 not allow MO testimony until all of the cooperators have
9 testified so that we don't get into a situation where they are
09:42:25 10 really -- they're coming in and saying, "My expert opinion is
11 this is what the organization -- a typical organization looks
12 like," and then we've had the co-conspirators coming in saying
13 that, because that's exactly the kind of issue that -- and I
14 don't have the cite of it. It's *United States v. Wells*. It's a
09:42:43 15 recent case. I didn't copy the front page. It was something I
16 copied when it came out recently.

17 THE COURT: Do you know the case? Do you know the case?

18 MS. VAN MARTER: Not off the top of my head, Your Honor.

19 THE COURT: Is this a Ninth Circuit case?

09:43:00 20 MR. SCHWEDA: Yes, Your Honor.

21 THE COURT: Okay. When did it come out?

22 MR. SCHWEDA: This year, I believe. I didn't copy the
23 front page. I mean, the case is --

24 THE COURT: I'll take a look at it, but right now,
09:43:10 25 that's my ruling.

1 MR. SCHWEDA: Okay. And --

2 THE COURT: So let's take up 757.

3 MR. SCHWEDA: And one other matter, Your Honor, that is
4 not enveloped in what the Court's ruled so far is the issue --

09:43:22 5 THE COURT: Are you talking about 617?

6 MR. SCHWEDA: Yes, Your Honor, and it's brought up by
7 617.

8 One of the -- one of our objections to their expert --
9 or they're saying it's nonexpert testimony. They're saying that
09:43:34 10 officers can get on the witness stand and, based upon their
11 training and experience, testify as to the meaning and
12 significance of various events in the conspiracy.

13 And our position is that if they are truly 701
14 witnesses, percipient witnesses with direct knowledge, they are
09:43:56 15 not allowed to give opinions based upon their training and
16 experience as law enforcement officers. That's not what 7 --
17 701 allows lay testimony, but it would be like, well, the car
18 was speeding; how fast do you think it was going? Well, I
19 thought it was going 40 miles an hour; or, I put my hand on his
09:44:20 20 forehead, and he felt like he had a fever. Those are the types
21 of opinions that are allowed to be given under 701.

22 Under 702, you have to have -- is the typical expert,
23 where they -- they can testify as an expert based upon their
24 training and experience.

09:44:38 25 And I think that the Government is trying to mix -- mix

1 those rules and have it both ways. For example, they're wanting
2 to have this money laundering expert come in and testify as to
3 the facts that he was involved in, but then also take the next
4 step and give an opinion based upon his training and experience
09:45:01 5 as to what certain things mean. And they haven't disclosed the
6 identity of the person, nor do we know exactly what the opinions
7 are going to be. They haven't disclosed any of that at all.

8 THE COURT: So I'm a bit stunned that you've failed in
9 your Rule 16 responsibilities.

09:45:20 10 Are you asking that all these witnesses be barred
11 because the Government's failed in their Rule 16 summaries? Is
12 that what you're asking?

13 MR. SCHWEDA: I'm asking --

14 THE COURT: Because they haven't provided you with the
09:45:32 15 Rule 16 summaries; is that right?

16 MR. SCHWEDA: Correct, Your Honor. I'm asking --

17 THE COURT: Okay. So it's correct. So --

18 MR. SCHWEDA: I'm asking --

19 THE COURT: No, no. You said it was correct. I asked
09:45:39 20 you a question --

21 MR. SCHWEDA: I'm trying to explain, Your Honor, if I'd
22 be given an opportunity.

23 THE COURT: Well, I'm going to hear from Ms. Van Marter
24 now.

09:45:47 25 MS. VAN MARTER: Your Honor, we did not notice those

1 individuals as experts. As I specifically noticed in detail in
2 some of our responses, as is also noted in the discovery, for
3 instance, the undercover agent, because he is a fact witness, is
4 not being noticed as an expert witness. He's going to be
09:46:03 5 testifying about his role in the investigation, his
6 communications regarding the money laundering. And there are a
7 series of cases that we cited in our materials that allows that
8 witness -- for us to ask questions like, why is that significant
9 to you? Why was this piece of communication? Those are all
09:46:21 10 authorized based upon his role in the investigation, similar to
11 that of many of the other law enforcement witnesses if they did
12 a search warrant, if they seized amounts of drugs and currency,
13 why would they seize --

14 THE COURT: So you're not asking for an expert opinion.

09:46:35 15 MS. VAN MARTER: Those are not expert opinions.

16 MR. SCHWEDA: I would disagree, Your Honor. I mean, if
17 they're going to testify to the meaning and significance of
18 various events based upon their training and experience, then
19 they become 702 expert witnesses. They are no longer 701 fact
09:46:51 20 witnesses.

21 THE COURT: Well, that may be, but you keep saying
22 they're not a 701 fact witness. So it's standard. Why did you
23 do what you did; that's a standard question. Why was that
24 meaningful to you? A police officer on the scene says it was
09:47:12 25 meaningful to me because, and then he explains, or she explains,

1 why in that neighborhood at that time, given what's gone on
2 there, this is of significance; or because they were wearing
3 certain colors and in that neighborhood, those colors mean this
4 and that, and that is based on my experience, and so that is why
09:47:30 5 it was significant; that's why I stopped the young guy. That is
6 just straight-up police investigation testimony.

7 If you have -- if Wells says something else, then I'll
8 certainly read it for that. And if you have a case that says
9 you cannot ask an investigating officer or an officer that's
09:47:50 10 undercover why he did what he did, I'd be happy to read that
11 one, because that would be surprising to me.

12 MR. SCHWEDA: Well, Your Honor, I guess the -- it's --
13 we're treading a fine line here between what is fact and what is
14 an expert opinion --

09:48:09 15 THE COURT: Well, you know, Mr. Schweda, you're going to
16 be able to do that at trial. And so it seems to me that I'm
17 going to permit the testimony as it's currently characterized,
18 but if at trial you think that somehow it's sliding into expert
19 testimony, then, by all means, renew your objection, and I'll
09:48:26 20 hear you out at that time, based on what I see and hear in the
21 testimony, the context.

22 MR. SCHWEDA: All right.

23 THE COURT: Sometimes it's just contextual, and you have
24 to make a decision based on context at the time of trial.

09:48:39 25 Now, remind me what you think *U.S. v. Wells* stands for

1 and how it applies to your motions.

2 MR. SCHWEDA: Well, it talks about the balance
3 between -- between probative value and prejudicial effect. And
4 what happened in Wells was a Dr. Reid Meloy was tendered as an
09:49:18 5 expert witnesses for targeted abuse in the workplace in a
6 multiple homicide case. The testimony invited the jury to find,
7 quote, fit, unquote, between Dr. Meloy's criminal profile and
8 the lay witness' testimony concerning Wells' own
9 characteristics.

09:49:40 10 And so the Ninth Circuit reversed because -- what
11 happened was that they allowed the doctor to say this person fit
12 the profile, based upon the lay testimony of other witnesses,
13 and basically allowed him to testify as to the ultimate issue in
14 the case.

09:50:12 15 THE COURT: It seems like it's a lengthy opinion, from
16 the number of pages you're turning.

17 MR. SCHWEDA: It is, Your Honor, and I didn't copy it
18 all, so that's why --

19 THE COURT: Okay.

09:50:24 20 MR. SCHWEDA: When it came out, I thought this is
21 something that I --

22 THE COURT: I'll take a look at it.

23 All right. On 757 -- we've taken care of 617. Let's
24 take a look at 757.

09:50:35 25 Are you ready for that?

1 MR. SCHWEDA: Yes, Your Honor.

2 THE COURT: Okay. Then let's look at it.

3 MR. SCHWEDA: The -- so Mr. Herrera Farias in 2012 was
4 charged in Yakima County Superior Court with possession -- or
09:50:55 5 pleaded guilty to possession with intent to distribute some
6 methamphetamine.

7 The Government -- this was a subject in our last hearing
8 of a motion to suppress that Your Honor denied. The Government
9 will present that testimony during the course of the trial as
09:51:13 10 evidence of my client's involvement in the conspiracy in this
11 case, and they have given -- they gave notice shortly before
12 that last hearing that they intend to use his prior conviction
13 as impeachment, if he should take the witness stand.

14 The problem that I have is Rule -- both Rule 609 and
09:51:36 15 403, again, direct the Court to consider the probative value
16 versus the prejudicial effect. And in this case, the
17 prejudicial effect would be that they're going -- they're going
18 to attempt to elicit that he was found guilty of this crime
19 during the course of the conspiracy, during the dates of the
09:51:56 20 conspiracy. And that we believe it would be inevitable that the
21 jury is going to put this together, and that they're going to
22 convict my client not based upon the -- whether he's a
23 conspirator or not, but based upon the fact that he pleaded
24 guilty to possession with intent to distribute. Not conspiracy,
09:52:19 25 but to possession with intent to distribute.

1 The -- so the -- this would pose -- first of all, the
2 Government has the burden of showing that the probative value
3 outweighs the prejudicial effect --

4 THE COURT: When you say "probative value," what are you
5 referring to?

6 MR. SCHWEDA: Well, they --

7 THE COURT: I just -- are you talking about a 609?

8 MR. SCHWEDA: Yes. And 403, for that matter as well,
9 Your Honor. They're both --

10 THE COURT: See, here is what I understand the
11 Government is going to do: I understand that the Government is
12 going to establish factually what happened in 2012, the facts of
13 the drug activity. It's also my understanding, subject to your
14 correcting me now, that the Government is not going to elicit
15 that he was convicted in 2012 of a particular -- of that which
16 would tie the dates together, but that if he testified, they
17 would simply impeach him on the basis that he had a prior
18 conviction for the prior conviction he has.

19 Your position is that if they do both, that a jury would
20 be able to tie those together and say if he -- if he did it in
21 '12 -- they're going to prove what he did in '12 was part of the
22 conspiracy. They're not going to prove the conviction was part
23 of the conspiracy. They're going to prove his activity is part
24 of the conspiracy. That's what I understand.

25 Now, do you understand something different?

1 MR. SCHWEDA: Well, I'm not sure that I'm following --

2 THE COURT: Okay. Well, let me try to make it as simple
3 as I can, given my understanding. I understand the Government
4 is going to elicit fact witnesses that say he did this in this
5 year. That's what they're going to elicit, and that was part of
6 the ongoing conspiracy.

7 Do you understand they're going to do that?

8 MR. SCHWEDA: Correct, the 2012 search of his home, yes.

9 THE COURT: Right. So they're going to say this is what
10 happened, and this is what we found, and it was in his dominion
11 and control. And then that's their case, and then they rest,
12 after a bunch of other witnesses.

13 And then you decide whether or not your client is going
14 to take the stand, and he does, too. And if he decides he's
15 going to take the stand, then they're going to impeach him with
16 a prior conviction for -- is it distribution of drugs or
17 possession?

18 MS. VAN MARTER: Possession with intent to distribute.

19 THE COURT: Possession with intent to distribute.

20 I assume -- now, typically, we wouldn't get into the details at
21 all of that in any case because it's -- in fact, people would
22 oftentimes stipulate, yeah, my client has a prior felony
23 conviction for an offense punishable by imprisonment for more
24 than one year.

25 Now, I don't know whether you will do that or won't do

1 that, but that's not uncommon. And so the question is how do
2 you want to diffuse that in the way you handle your case.

3 But if he takes the stand and he testifies, then they're
4 going to be able to elicit a prior conviction for a felony
09:55:28 5 exceeding one year -- or a term exceeding one year.

6 MR. SCHWEDA: Okay. And will they be able to establish
7 the date of that conviction?

8 THE COURT: The what?

9 MR. SCHWEDA: The date.

09:55:41 10 THE COURT: Well, if you contest the fact of it -- I --
11 I don't know what you're going to do, Mr. Schweda. But
12 depending on the context, depends on how you approach it, that
13 may require them to prove certain things. But if you open the
14 door, and you take a position that requires them to prove the
09:55:56 15 date, that's your problem. But typically what's going to
16 happen -- and correct me if I'm wrong, but typically they'd
17 simply elicit he has a prior felony conviction which he was
18 convicted for a crime punishable by imprisonment for a term
19 exceeding one year, period.

09:56:16 20 MR. SCHWEDA: And if that were the case, Your Honor,
21 that would, as the Government said, sanitize it, and if that's
22 the limits of what the Government can get -- get into, I can
23 deal with that. But right now what I'm concerned about is, is
24 that somehow it blows up into, well, it happened in 2012, it
09:56:38 25 happened in Yakima County Superior Court, and it just all of

1 a --

2 THE COURT: I've presiding over a bunch of trials in 20
3 years, and I've never heard that. I've never seen an AUSA
4 elicit those kinds of details of a prior conviction used for 609
5 purposes. Never, ever.

09:56:53

6 Have you? Because I haven't. And none of my colleagues
7 have ever told me they have. Nor could I imagine any -- any
8 efficacy, any reason to do that.

9 Now, have I articulated the way you're going to go about
10 this?

09:57:16

11 MS. VAN MARTER: Yes, Your Honor.

12 THE COURT: Okay. What else?

13 MR. SCHWEDA: That's all I have, Your Honor.

14 THE COURT: Okay. My ruling is it's denied, given the
15 representations here. If it changes at trial, then make your
16 objections in the context of trial. So ...

09:57:24

17 Somebody else had a piece of the action on these
18 motions. Do you want to be heard?

19 MR. THERRIEN: Judge, I had a motion to --

09:57:38

20 THE COURT: No, no. On these two motions.

21 MR. THERRIEN: No.

22 THE COURT: Did you join? Did anybody join these
23 motions, and if so, do they want to be heard? That's 617 and
24 757. They were joined in by one defendant.

09:57:58

25 Okay. Hearing none, Mr. Therrien, you're up.

1 MR. THERRIEN: Judge, the only motion in limine that I
2 have left or have filed was my motion regarding exclusion of
3 co-conspirator statements until the --

4 THE COURT: Give me one second. I just wanted to do --
09:58:33 5 Mr. Lara, you joined in that 617 motion. You didn't --
6 according to my records, you joined that motion.

7 MR. LARA: I did, Your Honor, but I have nothing to add.

8 THE COURT: Okay. And then, let's see -- okay.
9 You're up.

09:58:53 10 MR. THERRIEN: All right. Judge --

11 THE COURT: And so we're talking about which motion?

12 MR. THERRIEN: It's motion 619.

13 THE COURT: Okay. And that's been joined in again by
14 Mr. Lara and, I think, Mr. Schweda.

09:59:10 15 Okay. Go ahead.

16 MR. THERRIEN: Your Honor, the motion that I filed is --
17 it's a pretty consistent, or something that I use a lot of times
18 in conspiracies to prevent the Government from introducing
19 co-conspirator statements that they -- until they've proved a
09:59:29 20 conspiracy exists and my client is part of that conspiracy.

21 Throughout this case, as we've been reviewing discovery,
22 information has come to us as -- with controlled informants and
23 cooperating sources about Mr. Reyes Garcia. If you talk to one
24 controlled source, Mr. Reyes Garcia is -- was indebted to
10:00:00 25 Mr. Calvillo for -- in the amount of \$70,000 and him and

1 Baltazar (phonetic) Reyes Garcia, his brother, were attempting
2 to pay them back.

3 If you talk to someone else, Mr. Reyes Garcia is an
4 independent drug dealer; he transports drugs into the United
10:00:22 5 States, him and his brother on their own; they have their own
6 organization.

7 If you talk to some other source, if you read a report
8 from some other source -- a lot of it is historical -- that
9 Mr. Reyes Garcia makes a lot of money by, you know, fighting
10:00:39 10 roosters, and he owns a ranch in Pasco, and other -- other
11 things about Mr. Garcia that are really kind of historical in
12 nature as to what he did in the past.

13 The Government alleges that he -- he's been part of the
14 Calvillo drug trafficking organization since 2011. However, the
10:01:05 15 incident where he shows up and -- basically is the August 2015
16 transaction that took place in Grand Forks, Canada.

17 As a defense attorney, you have these various
18 statements, and you have the case coming up, you have -- we
19 don't have the disclosures, the grand jury transcripts, or the
10:01:28 20 *Giglio* disclosures or the identities of cooperating defendants
21 yet. We won't have those until August 31st. We won't have the
22 Government's witness list until September 27th, which is
23 something that is the usual course of business.

24 But what I was looking for here was to reserve this
10:01:49 25 argument, at least try to make an argument today and reserve

1 this argument for the time of trial, and wait to see what the
2 Government presents as evidence against Mr. Reyes Garcia in
3 terms of their witnesses and cooperating co-defendants.

4 What -- what I'm looking at is the last time we -- you
10:02:16 5 know, I recall the last time we talked on my motion for a bill
6 of particulars, the Government said his part in the drug
7 trafficking organization, of the Calvillo drug trafficking
8 organization was a transporter. So I have -- I have the -- I
9 can understand what they might be saying on the August 2015
10:02:41 10 transaction, but all the other evidence regarding -- or the
11 other allegations -- let me say allegations regarding those,
12 regarding his prior drug dealings, his owing Calvillo money, I
13 don't think -- make the connection that he's part of that
14 conspiracy. Being indebted to someone -- and I don't know how
10:03:04 15 he was indebted, and maybe I'll find out later what the
16 transaction was, but I don't have any evidence of that now,
17 other than an allegation made by a controlled human source that
18 he --

19 THE COURT: Have you made a presentation for various
10:03:19 20 defendants on why you think you can convict them?

21 MS. VAN MARTER: Your Honor, we actually provided the
22 grand jury a PowerPoint that summarizes the information as to
23 each defendant. That was provided months ago. And, also, in
24 our response I cited to a number of discovery page numbers in
10:03:36 25 response to --

1 THE COURT: You think would help them evaluate the
2 prospects of going to trial --

3 MS. VAN MARTER: Correct.

4 THE COURT: -- from your perspective.

10:03:43 5 MS. VAN MARTER: Correct, Your Honor. And --

6 THE COURT: Did you get that?

7 MR. THERRIEN: I'm not saying that I don't have an idea
8 of what they're going to say. I'm saying that --

9 THE COURT: Well, it seems to me, it's not a question of
10:03:52 10 an idea. That's a little limited. You mean they told you
11 exactly what they think they're going to prove.

12 MR. THERRIEN: Well --

13 THE COURT: They said: Here's what we're going to do;
14 here's the grand jury testimony.

10:04:01 15 MR. THERRIEN: Well, and I guess from -- my standpoint
16 is I'm not going to concede that unless -- you know, telling me
17 what they're going to prove and proving it at trial are two
18 different things --

19 THE COURT: Of course.

10:04:13 20 MR. THERRIEN: -- and I'm reserving that argument for
21 that time.

22 THE COURT: Well, sure. You're going to argue your
23 client is not guilty. But that's not the point here. The point
24 is was there a conspiracy established that would permit
10:04:24 25 co-conspirator statements. That's a decision I have to make at

1 trial. I can't make a decision now. They charged a conspiracy.
2 If they prove it to my satisfaction by the standards that the
3 Ninth Circuit stated, then, then -- and you can argue they
4 haven't -- then they can start introducing statements --

10:04:41 5 MR. THERRIEN: Right. Well --

6 THE COURT: -- of co-conspirators. But that's the
7 typical process. I can't make a decision about whether they
8 have a conspiracy just because they've charged it until I get to
9 trial and hear testimony.

10:04:51 10 MR. THERRIEN: I agree, Your Honor.

11 THE COURT: Okay.

12 MR. THERRIEN: I agree with that.

13 THE COURT: Okay.

14 MR. THERRIEN: What I'm saying is I don't want it to be
10:04:58 15 said that, well, why did you not file a previous motion in
16 limine regarding this before trial.

17 THE COURT: Sure. Okay.

18 MR. THERRIEN: And I've done that.

19 THE COURT: Okay. Great. You've filed your motion, and
10:05:07 20 right now the answer is that I deny it, and you can renew it if
21 there's a basis for doing so at trial.

22 MR. THERRIEN: Thank you.

23 THE COURT: All right. Other people joined in on that
24 motion.

10:05:16 25 Do you want to be heard?

1 MR. SMITH: Your Honor, on behalf of Juan Bravo
2 Zambrano, I had filed a separate motion in limine --

3 THE COURT: Excuse me. That's a different question.

4 Both the attorney for Brittany Lee Zaragoza and Edgar
10:05:46 5 Omar Herrera Farias, do you want to be heard on these motions?

6 MR. LARA: No, Your Honor.

7 MR. SCHWEDA: No, Your Honor.

8 THE COURT: Okay. Now Mr. Smith. That's ECF -- ECF
9 623.

10:05:59 10 MR. SMITH: My -- right. That's -- that is my motion.
11 But in the Government's response to that motion, they filed
12 their consolidated response to my motion, No. 623, and that
13 motion --

14 THE COURT: Yeah, they did.

10:06:14 15 MR. SMITH: And with regard to -- my -- my understanding
16 was that if -- and maybe I'm wrong on this, because different
17 courts handle it differently, but that we're all joined in
18 unless we specifically opt out. I thought that was the rule in
19 this courtroom, but perhaps I'm mistaken.

10:06:29 20 THE COURT: Does my case management order say that? If
21 it does, then that's what it says.

22 MR. SMITH: The -- the only issue that I want to deal
23 with with regard to the Government's consolidated response, ECF
24 No. 650, and this is specific to Mr. Juan Zambrano, is that the
10:06:46 25 Government says (reading): There are a number of witnesses who

1 will identify the defendants as playing a role in this
2 organization, in part based upon conversations directly with the
3 defendants or other identified conspirators, to include
4 Calvillo, that were made during and in furtherance of the
5 conspiracy. All right. This is on Page 22 of theirs.

6 And with regard to the information that the Government
7 identified, that -- they said, well, we have -- we have
8 witnesses, we have cooperators or source information that would
9 provide this testimony. I went through a process of discovery
10 with the Government, and they ultimately provided me, on
11 October 5th of 2017, with a statement, a report that was
12 prepared by Doug Stanley. And in it they identified two -- two
13 informants, one who was an anonymous tipster, and that person
14 said -- according to the report said only that they could say
15 that -- where Mr. Zambrano lived, who he was having a
16 relationship with, and what kind of car he drove, but nothing
17 connecting him to any conspiracy or any statement that any
18 person identified as a co-conspirator said about him or any
19 statement that he said.

20 Then the second person was an informant who had -- it
21 was a cooperating witness who had said that he or she had
22 information regarding Mr. Zambrano. The information as provided
23 was that the informant had personal contact with Mr. Bravo
24 Zambrano, knows him to be a multiple-pound meth dealer, who
25 transports narcotics into Canada, and that was the extent of the

1 information. No statements, no -- no -- no basis as to the
2 foundation for that particular view of Mr. Bravo Zambrano.

3 So when -- when the Government says in their response --
4 their consolidated response with regard to the statements,
10:09:04 5 co-conspirator statements that there are a number of witnesses
6 who will identify the defendants as playing a role in this
7 organization based in part on conversations directly with the
8 defendants or others, none of that has been identified as to
9 Mr. Bravo Zambrano.

10:09:24 10 And it seems to me that at this point in time -- we're
11 not asking for the identities of these people. We're not asking
12 for the information. All we're asking for is if there is a
13 statement out there that the Government says is made in the
14 course of and in furtherance of this conspiracy, that we be
10:09:42 15 provided that statement and --

16 THE COURT: That's -- that's the heart of their case,
17 that there are any number of statements made by any number of
18 witnesses that are in furtherance of. That's what I would
19 understand, given the sheer number of people in this case and
10:09:57 20 the breadth and scope of these conspiracies charged, that you'd
21 anticipate that there would be several individuals who,
22 including -- that are going to testify about the conspiracy and
23 what was said.

24 MR. SMITH: None of those statements as
10:10:18 25 identified have -- have anything to do with Juan Bravo Zambrano.

1 If they -- they said, "We'll give you the statements identifying
2 your client, we'll give you the statements of other individuals
3 who will testify, or potentially testify, with regard to your
4 client," and they have, and what we have is just what I've read
10:10:41 5 to the Court. And I just want to -- if that's -- if that's what
6 we have to deal with, I can deal with it. I am.

7 But in this response they said there's a number of
8 witnesses who will identify the defendants, talking specifically
9 about -- I think the three people named in this particular
10:10:59 10 response is Mr. Schweda's client, Mr. Therrien's client, and my
11 client. And so I'm trying to be a little bit more specific if
12 there's anything more out there than what the Government has
13 given us -- given me so far.

14 THE COURT: Ms. Van Marter?

10:11:18 15 MS. VAN MARTER: Your Honor, there's many responses.
16 Yes, what counsel is doing is taking out of context our
17 response, which was, in part, objecting to the broad nature of
18 their motion. It was very hard to respond to the motion with
19 respect to co-conspirator statements in the way it was filed,
10:11:33 20 and so we tried to respond to it as best we could by giving a
21 factual assertion at the beginning of our response into what
22 Mr. Smith is referring to as a conclusory paragraph, that
23 applied to all defendants.

24 There are two types of witness testimony that is
10:11:50 25 relevant that are going to come in. Those are types of

1 witnesses who not only personally observed and participated in
2 events, so it may not be a specific statement of a
3 co-conspirator, but "I was present. I saw that person backpack
4 before on so many occasions." That is not a co-conspirator
5 statement. That is what they witnessed and saw as a part of the
6 conspiracy. And then there are some witnesses who actually had
7 direct conversation with certain defendants about what their
8 role was or specific statements.

9 So a lot of some specific statements in this regard had
10 specifically to do with Miguel Reyes Garcia. Mr. Zambrano, with
11 respect to Mr. Smith's previous discovery requests, he asked for
12 a clarifying report as to the number of potential witnesses that
13 we had, so we provided a clarifying report as to the number of
14 witnesses that we expected to present outside of just the
15 additional physical testimony and witness testimony as to his
16 involvement that would provide testimony as to his overall
17 involvement in drug transportation. We did not go into
18 specifics as to all of the potential statements because most of
19 them are observational witnesses; people who knew Mr. Zambrano
20 to be a transporter or a backpacker, and knew him to be involved
21 based upon their own involvement.

22 So with respect to specific statements, we addressed
23 Mr. Smith's question by trying to narrow down the number of
24 potential witnesses specifically who would testify against that
25 particular defendant.

1 And each of these witnesses, as well, they cannot be
2 seen in a vacuum. They're seen in conjunction with the other
3 physical evidence that was done on the case. So, for instance,
4 with that particular -- one of the witnesses that Mr. Smith
10:13:21 5 referenced, as this Court is aware, based on Agent Stanley's
6 testimony, there was an ongoing investigation into Mr. Zambrano
7 where they had received a GPS order on that same vehicle that
8 was previously identified. So there's certain --

9 THE COURT: Is that the Canadian? Are you talking about
10:13:37 10 the Canadian stop?

11 MS. VAN MARTER: This is prior to the Canadian stop.
12 Prior to the Canadian stop.

13 THE COURT: Okay.

14 MS. VAN MARTER: And so some of those pieces corroborate
10:13:45 15 each other in terms of when they were here and what those
16 involvements were.

17 So I guess I'm -- I'm still not really sure if this is
18 becoming a more specific discovery request or if we're talking
19 about the co-conspirator motion. It's obviously the United
10:13:59 20 States' burden to establish he was a part of this conspiracy,
21 but there's a difference between observational witnesses and
22 witnesses who may have specific statements that they obtained
23 from a defendant.

24 THE COURT: Well, in the course of your discovery, and
10:14:10 25 you've provided them with grand jury summaries, were

1 statements -- were there statements that were specific to
2 Mr. Zambrano that you recall?

3 MS. VAN MARTER: Not specific statements that I recall.
4 What I -- if I am hearing Mr. Smith's request, we can go back to
10:14:26 5 that witness and make sure that we are not missing a specific
6 co-conspirator statement of the defendant. But it's -- my
7 understanding of these witnesses, it's based on their personal
8 knowledge and observations, not on --

9 THE COURT: Not on something that Zambrano said to them?

10:14:41 10 MS. VAN MARTER: Not on something directly said to -- by
11 Mr. Zambrano.

12 MR. SMITH: I don't want to have something like that
13 happen just prior to trial, Your Honor. We're preparing, and
14 I've asked --

10:14:53 15 THE COURT: Well, nobody ever wants anything like this
16 to happen, but we all know that in preparation for trial, things
17 occur, and you can seek such relief and remedies that you think
18 are fair and guarantee you due process at that time if it
19 occurs.

10:15:06 20 Right now I'm hearing that it's -- we were there
21 together, he picked up his backpack, I picked up mine, we
22 crossed the border, he was in the car, we all -- you know, that
23 was what was going on, so ...

24 MR. SMITH: There's no statement like that. There's no
10:15:20 25 witness like that.

1 THE COURT: Of course -- well, then I guess you're
2 moving that I just simply dismiss the case because of a lack of
3 evidence at this time; is that right?

4 MR. SMITH: I'm not, Your Honor. I'm just saying that
10:15:32 5 when she talks about observational witnesses, that's exactly
6 what we --

7 THE COURT: Well, you know, it sounds to me like you've
8 got a blueprint for your final argument -- your opening
9 statement, Mr. Smith. But right now I'm not sure that I can
10:15:43 10 give you what relief you seek; that is, she is saying she
11 doesn't -- as I understand it, she doesn't know of any
12 statements, and she doesn't intend to use any statements by
13 Mr. Zambrano to prove his -- that he -- his knowledge or his
14 participation, but, rather, as I understand it, that other
10:16:02 15 witnesses are going to say we were there together, and this is
16 what we did, and this is what he did.

17 MR. SMITH: No, but the second part, Your Honor, that's
18 the only part that I have any --

19 THE COURT: Because a percipient witness is going to
10:16:13 20 say, "I was there, and I saw Mr. Zambrano put the drugs in his
21 backpack and go across and get paid for it"?

22 MR. SMITH: We've asked for that information. If
23 there's any cooperating witness -- not identified -- if there's
24 any cooperating witness, any informant, any source that has any
10:16:29 25 percipient witness testimony, that we be provided that. Because

1 the court ordered that, and -- and, actually, Ms. Van Marter
2 said that she would provide it, and she gave us two people, one
3 of them --

4 THE COURT: Well, then she gave you those people.

10:16:47 5 What is your problem?

6 MR. SMITH: Here's the -- the only difficulty with that
7 is -- what we received is that -- it is stated this way: The CI
8 had personal contact with Zambrano and knows Bravo Zambrano to
9 be a multiple-pound meth dealer who transports narcotics into
10:17:05 10 Canada. That's it. No that he was -- observed anything, that
11 he was told anything. There's nothing to support that bare
12 statement.

13 And so we're saying if they made the statement, they
14 must have something. Give it to us now.

10:17:20 15 THE COURT: You say "something." What are you asking
16 for?

17 They said there's a person who is going to testify that
18 he knows, based on his observation, that this is so.

19 MR. SMITH: Didn't say based upon his observation. Just
10:17:31 20 said he --

21 THE COURT: They said what they said. So, Mr. Smith --
22 tell me what you think you said, Ms. Van Marter, so we can all
23 have a clear understanding of what you said and what you meant.

24 MS. VAN MARTER: During a debrief, the CW provided
10:17:42 25 information pertaining to Zambrano. The CW had personal contact

1 with Zambrano and relayed information pertaining to Zambrano's
2 drug trafficking and backpacking of controlled substances into
3 Canada.

4 I don't know what else -- I think it's just a way that
5 Mr. Smith is trying to get the identification of the individual.

6 MR. SMITH: Not at all. That's --

7 THE COURT: I'm satisfied she's given you what she can,
8 and you can make other objections as you wish.

9 Now, your motion is for what? Let's make sure we
10 carefully characterize your motion.

11 MR. SMITH: Well, our motion -- our specific motion is
12 No. 623. That's our motion in limine to prohibit them from
13 introducing the information, the evidence that they obtained
14 pursuant to the search warrant on December 15th, 2016, to --
15 what the Government says is to prove knowledge that Mr. Zambrano
16 knew that there were drugs in a vehicle and guns in a vehicle --

17 THE COURT: No, excuse me. I'm having a bit of a
18 difficulty following you. I thought we were talking about
19 statements.

20 MR. SMITH: We were.

21 THE COURT: Okay. Then what part of your motion is
22 that? There are several parts to your motion, aren't there?

23 MR. SMITH: There's -- well, there's several parts to
24 the Government's consolidated response. The motion --

25 THE COURT: So your motion should be -- why don't you

1 just tell me what your motion is. Because I thought I knew it,
2 but apparently I don't. So go ahead and tell me.

3 MR. SMITH: Are you asking for the motion in limine or
4 with regards to the statements?

10:19:16 5 THE COURT: I'm asking for 623. What is in 623?

6 MR. SMITH: 623 is the motion in limine to prohibit them
7 from introducing the fact of a marijuana grow, the fact that
8 there was a handgun and a shotgun and approximately 7 grams of
9 methamphetamine --

10:19:34 10 THE COURT: Okay. Let's stop there.

11 What about that?

12 MS. VAN MARTER: Your Honor -- and I apologize. I
13 thought the Court addressed that at the previous hearing.

10:19:44 14 THE COURT: That's not on my list of things to be
15 discussed today.

16 MS. VAN MARTER: I believe the Court already addressed
17 it, because there was also walkie-talkies present; things that
18 were consistent with what his identified role --

19 THE COURT: I don't see that as up today, Mr. Smith.

10:19:54 20 MR. SMITH: Your Honor had indicated --

21 THE COURT: Let me tell you -- let me do it differently.
22 Here's what I think we're doing.

23 MR. SMITH: All right.

24 THE COURT: So my understanding is that you objected to
10:20:03 25 testimony by a person who's not been previously identified as an

1 expert, and the Government has failed to provide discovery
2 pursuant to Rule 16.

3 Did you make such a motion under 623?

4 MR. SMITH: No.

10:20:17 5 THE COURT: Okay. Let me just go to 623 and cross-check
6 myself to make sure that I'm with you on this, so that we're all
7 on the same page.

8 Okay.

9 MR. SMITH: That was the motion --

10:20:38 10 THE COURT: Excuse me, Counsel. No, no. Not yet,
11 Counsel.

12 MR. SMITH: All right.

13 THE COURT: Not yet.

14 This is 623. Do you have your motion there?

10:20:46 15 MR. SMITH: I do.

16 THE COURT: Okay. Why don't you turn to Page 1.

17 How about Page 2, Line 3? What does it say?

18 MR. SMITH: Are we -- I'm sorry, Your Honor.

19 THE COURT: What does it say?

10:20:57 20 MR. SMITH: It says that -- that -- that the Government
21 should be prohibited from producing at the time of trial any
22 testimony, information, or evidence alleging Mr. Zambrano
23 manufactured marijuana or possessed methamphetamine on
24 December 15th, 2016. That's No. 3.

10:21:13 25 Any statement --

1 THE COURT: Excuse me, Counsel. I think you really have
2 trouble following.

3 MR. SMITH: I --

10:21:24

4 THE COURT: What I asked you for, Counsel, is what is
5 the first thing on Page 2 --

6 MR. SMITH: Opinion testimony.

7 THE COURT: Okay. Then what opinion testimony are you
8 referring to? And let's deal with that motion.

10:21:32

9 MR. SMITH: That one, I think the Court dealt with it
10 with Mr. Schweda.

11 THE COURT: Never can be sure. It's your motion, so you
12 tell me.

13 MR. SMITH: Just -- listen, Your Honor, the -- what we
14 wanted was that the Government be prohibited from providing
15 opinion testimony by any person who has not previously been
16 identified as an expert.

10:21:47

17 THE COURT: Any problems in that regard?

18 MS. VAN MARTER: No.

19 THE COURT: Okay. Granted. What's next?

10:22:03

20 MR. SMITH: Any statement from law enforcement regarding
21 evidence or statements alleged to be made by cooperating --

22 THE COURT: You need to talk a little bit more slowly.

23 MR. SMITH: -- regarding evidence or statements alleged
24 to be made by cooperating witnesses or confidential informants.

10:22:21

25 THE COURT: Ms. Van Marter?

1 MS. VAN MARTER: I -- I don't even know -- it's so
2 broad. I think he's just seeking to exclude all --

3 THE COURT: Well, I'm not sure -- that's the heading,
4 and headings are worth what headings are worth. What it says
10:22:35 5 is, in the body of his motion, all three lines of it (reading):
6 Under the Sixth Amendment to the Constitution, the defendant has
7 the right to confront all witnesses against him. All
8 out-of-court statements by nontestifying individuals should
9 therefore be excluded.

10:22:54 10 What's the Government's position?

11 MS. VAN MARTER: He will have the right to cross-examine
12 witnesses that we call and present. I don't know how that
13 relates to the heading of the confidential informant and
14 cooperating witnesses. I'm not really sure how to respond --

10:23:09 15 THE COURT: Nontestifying individuals, that's, I think,
16 the key to what he's talking about.

17 MS. VAN MARTER: Yeah, if they're not testifying, then
18 I'm not sure what --

19 THE COURT: He doesn't want you to say -- to talk
10:23:20 20 about -- elicit quotes from people who are not going to be
21 witnesses in the case. So that the agent doesn't get to say
22 that, "I talked to an undercover agent who's no longer available
23 and he told me this."

24 MS. VAN MARTER: I believe that would be a hearsay
10:23:36 25 problem. Unless it's admissible under some exception or a

1 co-conspirator statement, we would not be seeking to violate the
2 rules of hearsay.

3 THE COURT: Is there some clarification we need here,
4 Mr. Smith, that you think is important?

10:23:49 5 MR. SMITH: Your Honor, these have to do with any
6 statement that -- what I've just addressed with regard to the
7 two people that have been identified and no statements have been
8 identified that -- by these cooperating witnesses or source
9 information that identify Mr. Zambrano or have anything to do
10:24:10 10 with Mr. Zambrano.

11 THE COURT: No, I don't think -- that's just way too
12 broad. I can't anticipate whether someone is going to say, for
13 purposes of explaining their state of mind or why they did what
14 they did, certain things. So in that sense, your motion is
10:24:29 15 denied.

16 If it's a question of whether it's hearsay, then hearsay
17 statements should not be permitted, and aren't under the rule,
18 unless there's some exception. And that's -- and one of the
19 exceptions may be a co-conspirator statement that's produced
10:24:46 20 after a conspiracy is proved that may implicate your client in
21 some fashion or another, but I don't know. That's the rule, and
22 that's what I'll follow.

23 MR. SMITH: Well, I know that, Your Honor.

24 THE COURT: So I've done the best I can for you under
10:24:59 25 this, unless you want something else, and if so, what is it?

1 MR. SMITH: Well, I have -- this motion is broken down
2 into several parts.

3 THE COURT: No, it's not. No. Excuse me. This
4 particular motion is very straightforward. It's No. 2.

10:25:14 5 MR. SMITH: Right.

6 THE COURT: Okay. And so it says very specifically,
7 "all out-of-court statements by nontestifying individuals should
8 therefore be excluded." That is the nature of this subpart.
9 And we've just elicited that no hearsay will come in unless
10:25:29 10 there's an exception, and unless it's in furtherance of the
11 conspiracy, and so that's -- I'll enforce the conspiracy rule on
12 evidence, and I'll enforce the federal rules of evidence on
13 hearsay. That's your ruling.

14 MR. SMITH: I know you will, Your Honor. What I'm
10:25:47 15 saying is that with regard to that particular heading and then
16 No. 5 and No. 6 --

17 THE COURT: Counsel, headings aren't motions. Headings
18 are just headings. I just read you the body of the motion.
19 That's my ruling, and we're moving on to No. 3: The Government
10:26:03 20 should be prohibited from producing, et cetera. Now, talk to me
21 about that.

22 MR. SMITH: Well, this is the -- this is the motion to
23 prohibit them from introducing evidence of a marijuana grow, a
24 legal marijuana grow, 7 grams of methamphetamine, a pellet gun,
10:26:20 25 Remington shotgun, a Colt pistol, and ammunition that was

1 discovered during their search of December 15th, 2016, that they
2 say goes to his knowledge of methamphetamine and other drugs
3 being secreted in the -- the Mercedes Benz that was searched in
4 Canada approximately August 25th of -- or August 26th of 2015.
10:26:50 5 Guns and drugs were secreted in that vehicle. They say that in
6 December their -- the marijuana grow, 7 grams of
7 methamphetamine, and the firearms go to show his knowledge.
8 They also indicate -- the Government also indicates that in -- I
9 think they say that the documentation -- in their response they
10:27:14 10 say that there's documents that were obtained during their
11 search and that goes to show knowledge, the documents that
12 were -- relate to the -- their arrest in Canada. Apparently,
13 they found some documents in the house that showed that
14 Mr. Zambrano had been deported from Canada back to the United
10:27:38 15 States, and so those documents and physical evidence should be
16 admitted, and we disagree with that.

17 THE COURT: Okay.

18 MS. VAN MARTER: Your Honor -- and I apologize; I
19 thought the Court had handled this --

10:27:52 20 THE COURT: I thought I had handled all of that.

21 MS. VAN MARTER: I believe the Court has, so I would
22 refer to the Court's previous order in this regard. But to
23 reiterate, the United States believes that the evidence that
24 came out of the course of that search warrant is relevant. It
10:28:03 25 does not just include the documentation. It includes additional

1 possession of walkie-talkies or two-way radios, similar to what
2 was seized on the defendant --

3 THE COURT: Didn't you move to suppress that evidence?

4 MS. VAN MARTER: Yes.

10:28:13 5 THE COURT: You did move --

6 MR. SMITH: I moved to suppress it.

7 THE COURT: And I denied it.

8 MR. SMITH: Right.

9 THE COURT: So it's not suppressed, so they can use it.

10:28:20 10 MR. SMITH: Well, that was based upon the stop in
11 Canada, Your Honor, and based upon the search itself, not based
12 on a motion in limine under 401 and 403.

13 THE COURT: Okay. So --

14 MR. SMITH: This is 404(b) evidence. It's outside of
10:28:33 15 the period of the conspiracy. And so they would have to show --
16 they would have to articulate the evidential hypothesis that
17 they relied on. And their -- apparently, their hypothesis is
18 that it should be admitted to show Mr. Zambrano Bravo's
19 knowledge.

10:28:53 20 THE COURT: You say it's -- so let me hear from you.
21 You said a number of things, but one was outside of the scope of
22 the conspiracy, and because this is a very broad-ranging
23 discussion, I think we need to be specific and particular about
24 the aspects of Mr. Smith's motion.

10:29:09 25 MR. SMITH: The conspiracy --

1 THE COURT: Let me just try to make a record, if I can,
2 Mr. Smith. I want to make sure that we don't miss anything that
3 you're really interested in and that is important to you.

4 So go ahead, Ms. Van Marter.

10:29:21 5 MS. VAN MARTER: Your Honor, so if his argument is that
6 this is outside the scope of the conspiracy, this is --
7 obviously, as the Court knows, this has been a long-going and
8 ongoing conspiracy, and the facts and circumstances surrounding
9 his arrest, whether or not it's outside of the actual charged
10:29:34 10 date, can still be admissible as relevant for the scope of the
11 defendant's knowledge and continued activities.

12 Here we have specific evidence establishing what the
13 United States submits is continued knowledge and continued
14 activity. We've got drug-related evidence, firearms again,
10:29:48 15 again the presence of the walkie-talkies, the documentation
16 associated back with his contact and arrest. All of that,
17 whether or not it's outside the actual charged date of the
18 conspiracy, can still be admissible based upon those factors.

19 THE COURT: Hmm.

10:30:03 20 MR. SMITH: Well, the date of the indictment charges the
21 conspiracy from January of 2010 to December 6th of 2016. This
22 search took place on December 15th, 2016. There -- the argument
23 in their response was that this -- that the 7 grams of
24 methamphetamine and the firearms goes to prove his knowledge of
10:30:25 25 these same items being located in the vehicle.

1 THE COURT: Yeah, I'll have to take a closer look at
2 whether or not this material outside of the charged date of
3 conspiracy is admissible.

4 And did you address this in your omnibus?

10:30:42 5 MS. VAN MARTER: I believe I did, Your Honor. And I
6 would also note that with respect to the jury instruction, it's
7 on or about with respect to the conspiracy. I know that this is
8 a week after that actual time period. The Government could
9 always change that end date, but I think that the case law is
10:30:58 10 relatively clear, and we did cite that to the Court, as to the
11 things that can be admitted even if it's generally outside
12 because of that on or about instruction that the jury would get.

13 THE COURT: Yeah, I will have to take a closer look
14 because I'm not familiar with the law on that. So let me look.
10:31:11 15 The on or about or -- or even, as you suggest, you could change
16 the end date, all of those things would be true. But as it
17 currently stands, you haven't.

18 So let me look at the case law on that, and I'll get
19 back to you on that aspect of it.

10:31:26 20 Okay. What's next?

21 MR. SMITH: What's next, Your Honor, is the -- well, we
22 argue that, and we argue 401, and that even if -- even if it was
23 admissible, that it's more prejudicial than probative, so as
24 part of that argument --

10:31:41 25 THE COURT: It's -- and with regard to any 401 aspects,

1 it clearly is relevant. I only pause here because I want to
2 make sure what the law says about outside the charged date, and
3 the fact of his possession of these various items. So that's
4 what I'll investigate.

10:32:03 5 But it's certainly relevant and not prejudicial in the
6 objectionable sense. It may be actual prejudice because it may
7 convict him, but it's not -- the relevance certainly outweighs
8 any prejudice.

9 So what's next?

10:32:25 10 MR. SMITH: The -- our No. 5 and No. 6: The Court -- 5:
11 The Court should prohibit introduction by the Government of
12 statements made by co-defendant to law enforcement.

13 THE COURT: Counsel, you can read faster than most of us
14 that can hear, so just slow down.

10:32:44 15 MR. SMITH: Sorry.

16 THE COURT: Tell me what -- just remind me --

17 MR. SMITH: This is -- this is -- the last time we were
18 in court I addressed the issue of whether or not there were
19 statements made by co-defendants after their arrest that -- made
10:32:58 20 by co-defendants to law enforcement that we had not received
21 that could affect, you know, whether we went to trial together,
22 whether it raised any *Bruton* issues. So that motion was -- at
23 that time the Government said that they would essentially
24 identify that at some point in time, but we'd like to have it
10:33:18 25 sooner rather than later, if there were co-defendant statements

1 that implicate Juan Bravo Zambrano.

2 THE COURT: Is this No. 5?

3 MR. SMITH: Yes.

4 THE COURT: Okay. What is your position?

10:33:48 5 MS. VAN MARTER: Your Honor, we previously advised
6 Mr. Smith that there are no testifying co-defendants that would
7 create a *Bruton* issue; and of the co-defendants who have
8 provided statements relevant for purposes of trial, they have
9 been disclosed. It's just the identity at this point. So I'm
10:34:03 10 not aware of any --

11 THE COURT: Statements have been disclosed?

12 MS. VAN MARTER: I'm not aware of any co-defendant
13 statements that pertain directly to the defendant.

14 The cooperating witnesses that we previously discussed
10:34:14 15 earlier, that is a different issue. But as far as co-defendant
16 statements, this is my understanding what he's asking, so those
17 within this indictment that have now agreed to testify, I've
18 already advised Mr. Smith that I'm not aware of any of their
19 testimony that is a specific statement about Mr. Zambrano.

10:34:33 20 THE COURT: And that's the nature of your request, isn't
21 it? It says "co-defendants" --

22 MR. SMITH: Right.

23 THE COURT: -- "to law enforcement."

24 MR. SMITH: This is -- there's two different things.
10:34:42 25 She's saying she's already advised us of statements made by

1 co-defendants identifying Mr. Zambrano.

2 This is statements made by co-defendants after their
3 arrest.

4 So I think she's saying that there are none of those.

10:34:56 5 And number two --

6 THE COURT: There aren't any what?

7 MR. SMITH: There aren't any statements made by
8 co-defendants post-arrest that implicate Mr. Bravo Zambrano that
9 would -- that would affect his ability to go to trial with any
10:35:10 10 one of these people. So there's no *Bruton* issues, is what she's
11 saying.

12 MS. VAN MARTER: Right.

13 MR. SMITH: The second part goes to No. 6, and I think
14 there she's saying -- our Motion No. 6, and this is -- we kind
10:35:21 15 of started out with this because, frankly, Your Honor, I thought
16 I had done a separate motion for the -- for the motion in limine
17 with regard to the search. But, in any event, this -- No. 6
18 goes to the co-conspirator statements that -- that, again,
19 apparently -- what I hear the Government saying is that there
10:35:45 20 are none that implicate Mr. Bravo Zambrano; that there's no
21 percipient witness that's either a cooperating witness or a
22 source of information that implicates him; and there's no
23 statement by some other person saying that "Mr. Zambrano told
24 me" or "I saw Mr. Zambrano do this act." None of that exists.

10:36:16 25 MS. VAN MARTER: That is not what I said.

1 As I addressed earlier with the cooperating witness,
2 there's a difference between witnesses who personally observed
3 the defendant do something. We do have one of those
4 witnesses -- we just addressed it five minutes ago -- based on
10:36:29 5 our disclosure that they were personally present, so we do have
6 a witness who will provide --

7 THE COURT: This is an undercover person?

8 MS. VAN MARTER: No. This is a citizen witness,
9 cooperating individual.

10:36:37 10 THE COURT: Okay. So that person is going to say here's
11 what I saw Mr. Zambrano do and what we did together and that
12 sort of thing.

13 MS. VAN MARTER: Correct. And I am going to -- based
14 upon clarifications here, I will instruct that person to be
10:36:51 15 debriefed again to ensure we have not missed a statement --

16 THE COURT: A statement.

17 MS. VAN MARTER: -- that that person might have heard
18 the defendant state.

19 THE COURT: Sure.

10:36:58 20 MS. VAN MARTER: So we do have that witness.

21 But at this point --

22 THE COURT: You understand they have that witness, and
23 he's going to say the things that she says he's going to say.

24 MR. SMITH: Well, we're going to find out what he's
10:37:08 25 going to say, because in the debrief that we have, in the

1 materials that were provided, there's not one thing that he
2 says. It says that --

3 THE COURT: Counsel, I think maybe you're confusing
4 things. For the record, we're talking about the fact that this
10:37:22 5 witness is going to say your client -- he observed your client
6 do various things.

7 MR. SMITH: It doesn't say that.

8 THE COURT: Mr. Smith, I've been listening as carefully
9 as I can, and I believe that's what the Government witness is
10:37:35 10 going to say.

11 But why don't you tell me what you think the witness is
12 going to say, perhaps, for the second or third time.

13 MR. SMITH: Thank you, Your Honor.

14 THE COURT: Not you. Ms. Van Marter.

10:37:44 15 MS. VAN MARTER: Your Honor, again, as we -- I'll just
16 quote back to the report (reading): The CW had personal contact
17 with Zambrano and relayed information pertaining to Zambrano's
18 drug trafficking and backpacking of controlled substances.

19 And the grand jury summary that also indicates this
10:38:02 20 witness will testify that the defendant backpacked controlled
21 substances into Canada for the organization, much like the fact
22 that he got caught across the border backpacking drugs into
23 Canada.

24 MR. SMITH: Well, now she's not reading from that.

10:38:18 25 THE COURT: I'm sorry?

1 MR. SMITH: She's not reading from that.

2 MS. VAN MARTER: And then on the last --

3 THE COURT: Well, she's given you as much as she can,
4 and she's told you what is in the report. I've listened to it,
5 and I think you need to tell me now, based on that, what it is
6 that you think that she hasn't done as the AUSA that she needs
7 to do.

8 MR. SMITH: She has -- what she hasn't done, Your Honor,
9 is provide any information as to what this cooperating witness
10 actually saw or heard, whether he's a percipient witness that
11 saw Mr. Bravo Zambrano do anything or whether he's a percipient
12 witness that heard Mr. Bravo Zambrano say anything.

13 THE COURT: Well, as to 6, given the nature of it, it's
14 made pursuant to 801(d) (2) (E), [sic] and so let's remind myself
15 of what that is.

16 (Counsel conferring.)

17 THE COURT: So this is 801(d) (2) (E), and that simply
18 says that the statement is offered against an opposing party and
19 was made by the parties' co-conspirator during and in
20 furtherance of the conspiracy.

21 That's what you cited.

22 Is that right?

23 MR. SMITH: Yes.

24 THE COURT: And so how do you think that plays out in
25 this case as to Mr. Zambrano?

1 MR. SMITH: Well, because in the -- in the information
2 that's been provided, this is supposed to be a witness that they
3 are going to produce at trial against my client. And that what
4 they've provided is a -- this broad statement that says that he
10:40:21 5 knows somehow, that he -- that he's going to -- that during the
6 debrief, he had personal contact with Zambrano and relayed
7 information pertaining to Zambrano's drug trafficking and
8 backpack -- I don't even know what that means.

9 THE COURT: Once -- well --

10:40:38 10 MR. SMITH: Pardon me?

11 THE COURT: I'm going to permit the testimony as to
12 conspiracy establishment, and if it's established, any
13 statements by co-conspirators as to that conspiracy that are in
14 furtherance of and meet all of the tests necessary for
10:40:51 15 statements by co-conspirators at trial, I'll permit that
16 certainly.

17 And so whether or not those statements actually come up
18 at trial, you can make your objections at trial that the
19 conspiracy hasn't been established or these are not in
10:41:07 20 furtherance of or were after the conspiracy ended or whatever
21 you think is an appropriate objection in the context of trial.

22 But here you're talking about statements made by any
23 indicted or unindicted co-conspirator which directly or
24 indirectly refer to Mr. Juan Bravo Zambrano. And, to me, I'm
10:41:27 25 not going to -- right at the start, I'm going to deny that

1 motion because there could be statements made which directly
2 refer to Mr. Zambrano that are perfectly adequate or appropriate
3 for percipient witnesses. So the answer is "denied."

4 And then it says, "or which otherwise might be used to
10:41:49 5 incriminate Mr. Zambrano or other alleged co-conspirators." The
6 same ruling. I was with Mr. Zambrano, we went across the
7 mountains, we both had backpacks, he stuffed his drugs in his;
8 all of that is -- is acceptable and admissible. And so your
9 motion in that regard is denied. I'm looking right at your
10:42:12 10 motion. It says, prohibits statements made by any individual.
11 I'm not going to do that. An individual has a right to, in
12 fact, say, "This is what I saw." That is his or her statement.
13 That's what you asked for, prohibit statements made by any
14 indicted or unindicted individual which refer to Zambrano. "He
10:42:31 15 and I did drugs"; that goes in.

16 You have some nuance that escapes me, make it at trial
17 in the context of trial. So --

18 MR. SMITH: No, Your Honor. I'll do that. What I'm
19 looking for --

10:42:47 20 THE COURT: Counsel, what else do you have?

21 MR. SMITH: That's it.

22 THE COURT: I don't think so. This is your motion, and
23 there's actually several other parts to it.

24 MR. SMITH: Well, they're pretty standard.

10:43:01 25 THE COURT: I'm sorry? 7 and 8?

1 MR. SMITH: Right.

2 THE COURT: I grant No. 8, testifying witnesses excluded
3 except for case agent.

10:43:16 4 MR. SMITH: Yeah. Well, 7 goes to -- goes to -- is a
5 follow up on 6, but it's -- I don't know if the Court is denying
6 that or not. If -- what we're asking for, and -- and, frankly,
7 if -- it is specific to Mr. Zambrano but all statements --

8 THE COURT: No, stop. Stop. If you're saying --
9 perhaps I just, once again, don't understand your motion. But
10:43:36 10 as I think I understand it, you have a right under Rule 16 to
11 any statements of Mr. Zambrano that somebody else is going to
12 testify to.

13 Is that what you're asking about?

14 MR. SMITH: Yes.

10:43:50 15 THE COURT: Because I'm not sure.

16 MR. SMITH: It is.

17 THE COURT: Is it?

18 Okay. Well, that's not really what it says, but -- and
19 I understand that she's told you, and I think she's told us all
10:44:06 20 several times, that she currently has no statements by
21 Mr. Zambrano that are going to be testified to by others.

22 Haven't you? Haven't we covered this a couple of times?

23 MS. VAN MARTER: I have, Your Honor.

24 THE COURT: Did you think we covered that?

10:44:18 25 MR. SMITH: Well, I think that --

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1 THE COURT: It's a simple question: Did we cover it?

2 MR. SMITH: Yes.

3 THE COURT: Did we cover it?

4 MR. SMITH: The way the Court has framed the question,
10:44:29 5 yes.

6 THE COURT: Okay. That takes care of that, and I think
7 the Government has satisfied their burdens under 7.

8 I think that completes rulings on your motions. Thanks,
9 Mr. Smith.

10:44:41 10 Who else has a motion that we need to cover? Anyone
11 else?

12 Okay.

13 MR. SCHWEDA: All right. I joined in Mr. Smith's
14 motion.

10:44:55 15 THE COURT: For the same reasons, I'll make the same
16 rulings, unless you have something that requires a discrete
17 ruling as to your client.

18 MR. SCHWEDA: No, Your Honor.

19 THE COURT: Okay.

10:45:04 20 MS. VAN MARTER: And, Your Honor, to be specific to
21 Mr. Schweda's client, we have disclosed reports. There are
22 actual statements by his client to co-defendants that have been
23 disclosed regarding --

24 THE COURT: When you say "disclosed," what do you mean?

10:45:19 25 MS. VAN MARTER: In reports. So as I previously --

1 THE COURT: So you gave him the various investigative
2 reports?

3 MS. VAN MARTER: Correct.

4 THE COURT: So is that right, Mr. Schweda?

10:45:27 5 MR. SCHWEDA: Right. And -- but the --

6 THE COURT: Did you get reports --

7 MR. SCHWEDA: I got --

8 THE COURT: -- and did they have statements attributed
9 to your client in them?

10:45:38 10 MR. SCHWEDA: These reports, the identity of who is
11 reporting these is redacted.

12 THE COURT: So I guess the answer is he did, so ...

13 MS. VAN MARTER: Yes.

14 THE COURT: Anything else?

10:45:50 15 MS. VAN MARTER: No, Your Honor.

16 THE COURT: So we're good to go to trial. I think
17 there's nothing else.

18 Anything from you, Mr. Vieth?

19 MR. VIETH: Your Honor, I am -- I guess just give the
10:46:01 20 Court a quick up to date. I am working diligently with my
21 investigator, as the Court did approve, I believe, about a month
22 ago. He's busy working with Behind the Gavel to gather all the
23 information we possibly can, reviewing that with my client --

24 THE COURT: Would you tell me -- okay. Just give me a
10:46:21 25 second, Mr. Vieth, so I can add some context.

1 Ms. Van Marter, if you'll come back to the podium.

2 Why don't you tell me what you think you're going to
3 prove Mr. Vieth's client did. Just generally, what do you
4 expect for -- is he a -- just describe his role, if you would.

10:46:39 5 MS. VAN MARTER: Mr. Vieth's client, out of all of the
6 defendants before the Court, would be considered the
7 leader/organizer. He is the individual with which we have the
8 most testimony, co-defendant testimony, as well as his own
9 statements captured in his communications with the undercover,
10:46:55 10 who took over the role for Ivan Calvillo after he was murdered.

11 THE COURT: Are these audio, transcribed statements?

12 MS. VAN MARTER: The transcriptions have all been
13 provided. There's some audio/video recordings with his meets
14 with the undercover, as well as the WhatsApp communications,
10:47:10 15 which they would communicate with each other prior to
16 face-to-face meetings.

17 THE COURT: That's all I need. Okay. Thank you.

18 All right. Mr. Vieth, what is next for you?

19 MR. VIETH: Well, first off, Your Honor, we would want
10:47:21 20 to make sure that we review as much as we possible can the
21 30,000 pages that have been provided by the Government, and
22 then --

23 THE COURT: Well, when you say 30,000 pages, you mean
24 the 30,000 pages that Under the Gravel [sic] has analyzed and
10:47:33 25 given you directions on what is attributable to your client;

1 isn't that right?

2 MR. VIETH: Correct, Judge. And as the Government has
3 pointed out, my client is in a lot of those reports.

4 The issue that I don't really want to discuss in front
10:47:50 5 of everybody, but I may end up filing something *ex parte* with
6 the Court and potentially requesting some additional time for
7 pretrial motions, but I would like to reserve that for something
8 in writing, Judge.

9 THE COURT: I believe we've covered all of the pretrial
10:48:10 10 motions for all other defendants except for you and --

11 MR. VIETH: And I believe Mr. Niesen.

12 THE COURT: -- those that are going to be separated out
13 for trial in March.

14 MR. VIETH: And I understand that -- I believe the Court
10:48:22 15 gave us until the 10th for -- or 11th for any and all additional
16 motions, but I just wanted to make sure that the Court was aware
17 that I am contemplating providing the Court with some basis but
18 I don't want to disclose that basis in front of everybody.

19 THE COURT: Yeah, June 11th is your deadline. And as
10:48:42 20 far as your preparation, that's fine.

21 When is our trial date, October 12th?

22 MS. VAN MARTER: I believe so, Your Honor.

23 THE COURTROOM DEPUTY: October 10th.

24 MR. MARCHI: October 10th is what I have, Your Honor. I
10:48:54 25 just want to confirm that date, because I was told to be ready

1 by then.

2 THE COURT: October 10th we're going to trial.

3 So anything else?

4 MR. VIETH: No, Judge.

10:49:03 5 THE COURT: Anything else?

6 MS. VAN MARTER: Your Honor, I did want to mention one
7 new issue that has come up since Mr. Niesen's appointment in
8 this matter, but the Court has kind of taken care of it by
9 putting his trial at a separate date that I will address with
10 Mr. Niesen for the record and will submit it to the Court *in*
11 *camera*.

12 THE COURT: Yeah, I'll prepare a separate scheduling
13 order and those -- and those two individuals will be severed
14 from this trial, and they will be tried together on a date --
15 why don't you folks confer, the three of you, about a date in
16 March, and talk with my deputy clerk about that as well.

17 MS. VAN MARTER: Yes, Your Honor.

18 THE COURT: Okay. And then give me your
19 recommendations, and we can frame a case management order for
10:49:43 20 you.

21 MS. VAN MARTER: Yes, Your Honor.

22 THE COURT: Okay.

23 MR. VIETH: Your Honor, there was one more thing, if I
24 may.

10:49:47 25 THE COURT: Sure.

1 MR. VIETH: In regard to Behind the Gavel, and I know
2 the Court understands that I'm the budgeting attorney for -- for
3 their offices moving forward for all counsel, so I just want to
4 make sure that the Court is aware they'll be working with new
5 counsel as they come on board. So I know that I provided the
6 Court with the request. That request may increase as more
7 attorneys start coming on board.

8 THE COURT: Do you anticipate more attorneys coming on
9 board?

10 MR. VIETH: That is up to the Government, Judge.

11 THE COURT: Oh, you mean for fugitives.

12 MR. VIETH: For what, Judge?

13 THE COURT: For fugitives, people who have not yet been
14 arrested and pursuant to indictment.

15 MR. VIETH: I -- I just wanted to make sure that the
16 Court is aware that that is not a ceiling yet. It's rolling --

17 THE COURT: No, no. I --

18 MR. VIETH: -- expertise for us, and I just wanted to
19 make sure that the Court is on notice.

20 THE COURT: I am.

21 MR. VIETH: Thank you, Judge.

22 THE COURT: All right. I believe that completes
23 matters.

24 Anybody else have anything?

25 Okay. So the new defendants will confer with Ms. Van

1 Marter and get a scheduling order recommendation. The new
2 attorneys will talk to Mr. Vieth and the Ninth Circuit resource
3 person on budgeting, and then submit budgets for my review. And
4 I believe that completes matters.

10:51:12 5 When is our next PTC?

6 MS. VAN MARTER: That is what I was just going to ask to
7 clarify. I believe that's set currently as a potential
8 contested hearing date, based on new motions for Mr. Vieth, if
9 he has any, and any other potential trial-related matters, and I
10:51:27 10 believe Ms. Vargas said that date earlier, and I had forgotten
11 it again.

12 THE COURTROOM DEPUTY: I believe it's September 18th,
13 but I'm going to confirm.

14 THE COURT: Yeah, so we won't be having any further
10:51:39 15 conferences unless something occurs that requires a special
16 setting.

17 MS. VAN MARTER: Yes, Your Honor.

18 THE COURT: All right, folks. Thank you. Court's
19 adjourned. You may go about your business.

10:52:01 20 THE COURTROOM DEPUTY: All rise.

21 (Hearing concluded at 10:52 a.m.)
22
23
24
25

C E R T I F I C A T E

I, KIMBERLY J. ALLEN, do hereby certify:

That I am an Official Court Reporter for the United States District Court for the Eastern District of Washington in Richland, Washington;

That the foregoing proceedings were taken on the date and at the time and place as shown on the first page hereto; and

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 18th day of January, 2019.



Kimberly J. Allen, CRR, RMR, RPR, CCR(WA)
Washington CCR No. 2758
Official Court Reporter
Richland, Washington